82855-5

26124-7-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

JOSE JUAN MONTANO,

Respondent.

DIRECT APPEAL
FROM THE SUPERIOR COURT OF GRANT COUNTY

APPELLANT'S REPLY BRIEF

Respectfully submitted:
JOHN KNODELL
Prosecuting Attorney

Teresa J. Chen

by: Teresa J. Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Page No.

Statutes

I. ARGUMENT IN REPLY

THE DEFENDANT'S RESISTANCE TO ARREST WAS A CONTINUING ACTION THAT MOVED FROM PHYSICAL RESISTANCE TO VERBAL INTIMIDATION AFTER HE WAS PHYSICALLY RESTRAINED.

In the Statement of the Case of the Defendant's Response, the Defendant states that "when the respondent made the threats to the officer, he no longer was trying to resist being arrested." Reply Brief of Respondent at 5. This is improper. Under RAP 10.3(a)(5), the Statement of the Case should be a "fair" statement of the facts, made "without argument." The Defendant's interpretation is neither nor fair nor free from argument.

Even if this statement were made only in the Argument section of the brief, it is unsupported by the record he cites or the facts. The Defendant's citation for this statement is to CP 18, a page from the police report which does *not* describe the period of time in which the threats were made.

The Defendant repeats his assertion in the body of his brief. Reply Brief of Respondent at 10 ("At the time that the respondent made the threats, he no longer was resisting arrest."). The State has explained that the Defendant's threats were a continuing means of resisting arrest. Appellant's Brief at 8 ("he continued preventing the arrest through his threats"). And this interpretation is plain from the context of continued resistance: the Defendant

refused to give the officer his name, refused to provide identification, walked away, refused orders to stop, wrested free from the officer's grasp three times, only stopped *physically* struggling long enough to be handcuffed *after* he had been tased *twice*, and finally maintained a stream of threats by word and gesture while being transported from Quincy to Ephrata. Every one of these acts, the State has argued, is an attempt to resist arrest.

The officer's action (handcuffing and transporting) did not alter the Defendant's intent, but only restricted his *means* of resisting. His resistance moved from physical to verbal after the Defendant was physically restrained.

The State's position was made plain in the Appellant's Brief. The Defendant's mere assertion to the contrary, without argument in support, is not persuasive.

THE OFFICER'S DUTIES REGARDING THE ARREST AND PROSECUTION OF THE DEFENDANT WERE NOT COMPLETED MERELY BECAUSE THE DEFENDANT WAS HANDCUFFED AND SEATED IN A PATROL CAR.

The Defendant argues that every action or decision that the officer made in this case was completed before the Defendant made his threats of intimidation. Reply Brief of Respondent at 10 (arguing that the statute does not prohibit threats of harm based on *past* decisions); Reply at 12 (arguing

that the officer's duties were fully discharged once the Defendant had been "arrested, handcuffed, and was being escorted to the officer's patrol car."). This is contradicted by his own earlier argument that the Defendant did not articulate the magic words "if you don't release me." CP 14.

Plainly the officer had a continuing duty to *maintain* custody of the Defendant (not release him) and transfer him into the custody of the jail. As the State previously explained (Appellant's Brief at 20), the officer also had a duty to write a report, take witness statements, request that the prosecutor file charges, and assist the prosecutor by any further investigation and by testifying at pretrial hearings and trial. The Defendant's briefing completely ignores this truth. The officer's duties in connection to this arrest were not "past," but ongoing.

THE DEFENDANT'S BURKE ARGUMENT FAILS, BECAUSE THE STATUTE REQUIRES THE OFFICER'S DECISION TO BE AN *OFFICIAL* ACTION TAKEN *AS A PUBLIC SERVANT*, AND NOT MERELY ANY ACTION MADE WHILE ON DUTY.

The Defendant discusses State v. Burke, 132 Wn. App. 415, 132 P.3d 1095 (2006) at some length. Reply Brief of Respondent at 7-11. In that case, the officer abandoned his pursuit of underage drinkers and attempted to make a warrantless entry of a home where no exception to the warrant requirement

existed and where no official action was required *within* the house. The State has explained that the case is distinguishable. The defendant's [Burke's] belly bumping of the officer was not an attempt to influence a public servant's vote, opinion, decision, or other official action, required by RCW 9A.76.180, because the officer had already abandoned pursuit. Appellant's Brief at 13.

The Defendant argues that as long as an officer is "on duty,"*any* action he takes is an official action. Reply Brief of Respondent at 9. He offers no authority for his assertion.

The statute requires an attempt to influence "an *official* action" taken "*as a public servant*," not, as the Defendant misrepresents, an action taken merely while "on duty." RCW 9A.76.180. See also State v. Coy, 40 Wn.2d 112, 114-15, 241 P.2d 205 (1952) (explaining that the essential elements of intimidation are that the accused shall (1) by means of any threat, force or violence, (2) attempt to deter or prevent (3) any executive or administrative officer (4) *from performing a duty imposed upon him by law*.)

Consider the following scenario. A customer is standing in line behind a police officer at a Subway Restaurant. The customer has been anticipating and craving a pastrami sandwich. He overhears the officer order

a pastrami sandwich and overhears the Subway employee state that there is only enough pastrami for this one sandwich. The customer threatens to smack the officer if he takes the last of the pastrami.

This threat of violence is not an attempt to influence an *official* action *taken as a public servant.* Any person, public servant or otherwise, could order a pastrami sandwich. It is not an act required by the officer's position. And the customer's harassment of the officer does not threaten the "public's interest in a fair and independent decision-making process" or "lead to corrupt decision making" which undermines the "public confidence in democratic institutions." State v. Stephenson, 89 Wn. App. 794, 803-04, 950 P.2d 38 (1998). The public has no interest in the officer's luncheon choice.

Nor does the public have an interest in an officer's choice of path to his car. In Burke, the officer's attempt to enter into a home unlawfully was not an official action taken as a public servant. He was not investigating any crime. He was returning to his car. And he could do so lawfully by going around the house. The court's decision can be explained as finding insufficient evidence of an attempt to influence an official action where the officer did not intend any *official* action. No one contends there was any official act to be performed inside the house.

The Burke case is further distinguished on the facts. The Defendant Montano's threats were made in the context of a much longer contact with the officer. Burke's contact with the officer consisted entirely of a very quick altercation absent any context. Burke and the officer had not met before Burke shoved (belly bumped) him and took a swing at him. Montano's contact, on the other hand, had quite a bit of context. The officer observed Montano assault his brother. The officer spoke with the brother who requested his assistance. The officer attempted an interview with Montano. And Montano made strenuous and continued resistance to the arrest, requiring two taser deployments and handcuffs. The resistance continued throughout a twenty minute ride to jail. Where the intent of Burke's context-free assault is questionable, there is no doubt as to the intent of Montano's threats.

THE DEFENDANT CONCEDES THAT THERE IS NO REQUIREMENT FOR MAGIC WORDS.

The Defendant concedes that a threat need not be verbalized. Reply Brief of Respondent at 11 ("The issue isn't whether or not a threat has been verbalized or implied."). He concedes that, for example, merely by holding a gun to a cashier's head in a particular context, a robbery is understood.

Reply Brief at 11 ("He is actually robbing them.") In other words, although the robber does not say "unless you give me money," the Defendant concedes that the context provides sufficient evidence of this intent to rob.

PUBLIC POLICY ENCOURAGES THE RESPECT OF POLICE OFFICERS.

The Defendant argues that "the threshold for intimidating a lay person should be lower than intimidating a police officer." Reply Brief of Respondent at 12. He is unable to cite a single authority for this proposition.

As previously explained (Appellant's Brief at 20), the legislature has determined that a threat to a public servant in the discharge of public duties is much more serious than a threat to a lay person. RCW 9A.46.020; RCW 9A.76.180. And the courts have explained why this is good policy. State v. Stephenson, 89 Wn. App. at 803-04 (to insure the integrity of public servants and their decisions made in the public interest). Consider, too, that the legislature has determined that when the victim of a first degree murder is a police officer, the defendant can be eligible for the death penalty. RCW 10.95.020(1). Public policy is pretty clear.

The Defendant argues that police officers should be used to abuse. Reply Brief of Respondent at 12 ("They have been trained to deal with angry,

belligerent people on a daily basis."); Reply at 13 ("an implied compact [to] be tolerant of a certain amount of verbal abuse"). Certainly there are members of the public who feel this way. The existence of the attitude does not make it right.

Under the Defendant's argument, the threshold of what constitutes abuse for mothers of small children and criminal defense attorneys should also be higher. Mothers and defense attorneys also deal with difficult, unreasonable, demanding, and irritable people on a daily basis. This does not mean that they should have to put up with abuse or threats against their lives. That they, like police officers, choose lives of service does not diminish their worth. Quite the opposite.

Officers are not our punching bags. Their lives are not less precious, and threats against their lives are not less serious. It is not good policy to suggest to the public that they will get away with assaulting and abusing officers – who are armed with weapons and trained to be highly sensitive to cues of violence. The better policy is to encourage respect of officers. If public servants are poorly treated, the service they provide will be affected adversely. The public policy is and must remain to deter abuse of officers.

The Defendant seems to make the following analogy. Officers :

public :: parents : children. This is not simply not true. Officers are not endowed with greater strength, wisdom, and patience than every member of the public. They are human and deserving of human respect. Because their integrity is necessary for the health, safety, and morality of the public, the intimidation of them is a more serious, not less serious, matter.

The Defendant argues that an arrestee should not be punished for a mere angry response. Reply Brief of Respondent at 13. But those are not the facts here. The facts establish that Mr. Montano's threats were cold and calculated, not merely angry, continuing over a twenty minute drive. The context of the threats establishes an attempt to intimidate the officer into releasing him.

To argue that the Defendant, who had publicly assaulted his brother and vigorously resisted arrest, was "in a stressful, vulnerable position" is the classic definition of chutzpah. Reply Brief of Respondent at 13. The Defendant placed himself in that position. It does not give him license to commit further crimes.

The Defendant argues that the State has a "zero tolerance policy" toward impolite behavior toward police officers. Reply Brief of Respondent at 13. The argument discredits officers and prosecutors and is without any

factual basis. Although officers should not have to put up with abuse, they certainly are exposed to difficult personalities and to people going through their most difficult times. Police officers have discretion, prosecutors have discretion, and juries have discretion. They exercise that discretion to a defendant's benefit all the time. Mr. Montano was more than impolite. He received the charges his case deserves. His abuse of the officer was persistent, continuing, and had a real effect on the officer. The officer was sufficiently concerned so as to request that several jailers be present when he transferred custody and so as to request the intimidation count be charged.

THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE CHARGE OF INTIMIDATING A PUBLIC SERVANT.

The Defendant's threats were made in the context of his continued attempts to secure release. The decision the Defendant was attempting to influence was the officer's decision to arrest, transport, continue to investigate, and press charges. By failing to observe any inference provided by the plain context of the contact, by failing to admit that a rational finder of fact would have observed those inferences, the trial court abused its discretion in granting the Knapstad motion. Although the Defendant has conceded that there is no requirement of magic words, the Defendant fails to

address this argument that the context and plain inferences exist and, therefore, required a denial of the Knapstad motion.

VI. CONCLUSION AND RELIEF REQUESTED

Based upon the forgoing, the State respectfully requests this Court reverse the dismissal of count one.

DATED: Dec. 6, 2007.

Respectfully submitted:

JOHN KNODELL,
Prosecuting Attorney

Teresa Chen

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney